

A disaster for business, a triumph for scheme members – or neither?

On Friday, 14 October, the Court of Appeal upheld the High Court's decision in the Lehman/Nortel case, confirming that liability arising from a Financial Support Direction ("FSD") issued by the Pensions Regulator after a company has entered administration or liquidation will have super priority status in the insolvency.

Any subsequent Contribution Notice, issued for non-compliance with an FSD, would be paid **before** debts which are due to the insolvent company's creditors and most other expenses of the insolvency process, including the remuneration of the appointed insolvency practitioners.

FSDs can be issued either where a scheme is insufficiently resourced or where the scheme's employer is a service company. The FSD directs target entities, which can include companies which are connected to or associated with the scheme's employer, to put in place support until the scheme is wound up. Recipients must propose arrangements deemed to be reasonable to the Pensions Regulator. If they do not, the Pensions Regulator may issue a Contribution Notice specifying an amount to be paid.

At a hearing held last year, the High Court had to decide whether the cost of complying with an FSD issued after administration had begun was:

- An expense in the administration (i.e. the FSD would rank above all other creditors in the insolvency process).
- An unsecured provable claim in an insolvency (i.e. the same as other unsecured creditors); or
- Not recoverable at all, meaning that by entering into administration or liquidation, the company's assets were beyond the reach of the Pensions

Regulator's power.

The judge decided on the first option and the Court of Appeal agreed.

This case represents a struggle between pension scheme trustees and their members on one hand and UK business and the rescue culture on the other. From the scheme trustees and members' point of view, to have held that an FSD was simply a provable debt might have seen an FSD issued against an insolvent target disappear down a black hole with little prospect of being met.

However, before we see the case as an overwhelming victory for pension trustees, remember that:

- The High Court and the Court of Appeal's decision is not based on any principle that pensioners should be treated better than all other creditors – rather the inevitable conclusion to be drawn from the unplanned interaction between the Pensions legislation and Insolvency legislation.
- The case is bound for the Supreme Court unless Parliament succumbs to industry pressure sooner rather than later and sorts out the "legislative mess" the courts have identified and demotes such claims to being unsecured.
- If liabilities under FSDs or Contribution Notices rank above secured bank loans, companies with potential pension scheme liabilities are unlikely to attract funding. This will be a further blow to government pressure for the banks to lend more; and
- Insolvency Practitioners (and their Bank appointers) will be wary of taking on cases where even the costs of the insolvency might not be met from the company's assets – leaving compulsory winding up as the only option.

